

HONORABLE RICHARD A. JONES

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

WILD FISH CONSERVANCY,

Plaintiff,

v.

SCOTT RUMSEY, *et al.*,

Defendants,

and

ALASKA TROLLERS ASSOCIATION,

Defendant-Intervenor,

and

STATE OF ALASKA,

Defendant-Intervenor.

Case No. 2:20-cv-417-RAJ-MLP

DEFENDANTS' RESPONSE TO  
PLAINTIFF'S OBJECTIONS TO  
REPORT AND  
RECOMMENDATION

## TABLE OF CONTENTS

|  |     |
|--|-----|
| TABLE OF AUTHORITIES .....   | ii  |
| TABLE OF ACRONYMS .....  | iii |
| INTRODUCTION .....   | 1   |
| ARGUMENT .....   | 2   |
| I. Plaintiff’s Challenges to the Findings Are Misplaced. ....  | 2   |
| A. NMFS Is Conducting Site-Specific Reviews for Each Disbursement. ....                              | 2   |
| B. Plaintiff Fails to Show that the Prey Increase Program Will Harm Salmonids.....                   | 4   |
| C. Plaintiff Fails to Recognize that the Prey Program Provides a Meaningful<br>Increase in Food..... | 5   |
| II. Plaintiff Errs in Its Attempt to Tip the Scales in Favor of Vacatur. ....                        | 6   |
| III. Plaintiff’s Recycled Assertions About Injunction Fail.....                                      | 7   |
| CONCLUSION.....  | 8   |

**TABLE OF AUTHORITIES**

| <b>Cases</b>   | <b>Page</b> |
|--|-------------|
| <i>Inst. for Fisheries Res. v. U.S. Food &amp; Drug Admin.</i> ,<br>499 F. Supp. 3d 657 (N.D. Cal. 2020) ..... | 7           |
| <i>Metcalf v. Daley</i> ,<br>214 F.3d 1135 (9th Cir. 2000) .....   | 7           |
| <i>Monsanto v. Geerston Seed Farms</i> ,<br>561 U.S. 139 (2010).....   | 8           |
| <i>Nat. Res. Def. Council, Inc. v. U.S. Dep’t of Interior</i> ,<br>275 F. Supp. 2d 1136 (C.D. Cal. 2002) ..... | 7           |
| <i>Nat’l Wildlife Fed. v. NMFS</i> ,<br>839 F. Supp. 2d 1117 (D. Or. 2011) .....                               | 7           |
| <i>Winter v. Nat. Res. Def. Council, Inc.</i> ,<br>555 U.S. 7 (2008).....                                      | 8           |
| <br><b>Regulations</b>   |             |
| 50 C.F.R. § 402.16 .....   | 4           |

# **TABLE OF ACRONYMS**

|      |   |
|------|---|
| BiOp | Biological Opinion                      |
| ESA  | Endangered Species Act                  |
| NEPA | National Environmental Policy Act       |
| NFH  | National Fish Hatchery                  |
| NMFS | National Marine Fisheries Service       |
| pHOS | Proportion of Hatchery-Origin Spawners  |
| PNI  | Proportionate Natural Influence         |
| pNOB | Proportion of Natural-Origin Broodstock |
| SEAK | Southeast Alaska                        |
| SRKW | Southern Resident Killer Whales         |

## INTRODUCTION

In this case, Plaintiff has insisted that a central part of its organizational mission is to ensure the well-being of Southern Resident Killer Whales (SRKW). Dkt. # 91-6 ¶¶ 6, 8-10. Nevertheless, Plaintiff has asked the Court to shut down a National Marine Fisheries Service (NMFS) prey increase program that is aimed squarely at supplementing the SRKW food supply. Dkt. # 127 at 10. The Report and Recommendation recognized the environmental harm that will flow to endangered SRKW if the parts of NMFS's 2019 Biological Opinion (BiOp) pertaining to the prey increase program are vacated or if that program is permanently enjoined. Dkt. # 144 at 30-34. Accordingly, the Report and Recommendation properly recommends that these two forms of remedy not be granted. *Id.* at 37.

Plaintiff has lodged objections to those recommendations and asks the Court to reject them. Dkt. # 151 at 15. But even putting aside the continued inconsistency between Plaintiff's purported mission and its request to shut down the prey increase program, Plaintiff's objections to the Report and Recommendation suffer from at least two flaws. First, Plaintiff fundamentally misunderstands NMFS's site-specific analysis of those hatcheries that have received funds as part of the prey increase program. *Id.* at 10-11. Contrary to Plaintiff's assertions, NMFS has analyzed each site-specific disbursement to ensure compliance with both the Endangered Species Act (ESA) and National Environmental Policy Act (NEPA). Dkt. # 133-3 (Third Purcell Decl.) ¶ 5. Thus, NMFS has and will continue "to limit any potential negative impacts" to wild salmon. Dkt. # 144 at 35.

Second, Plaintiff muddies the waters regarding the benefits of the prey increase program. Plaintiff contends that there is no evidence "demonstrating that the prey increase program will provide a net benefit to SRKWs." Dkt. # 151 at 11. But as the Report and Recommendation stated, "[h]atchery produced Chinook salmon benefit the SRKW as they support such needed prey availability and contribute to the salmon stocks consumed by the SRKW." Dkt. # 144 at 31. The equation is straightforward: more fish in the right places and at the right times will meaningfully increase prey availability.

1 In the face of these foundational flaws, Plaintiff's arguments about vacatur and  
 2 injunctive relief collapse. *See* Dkt. # 151 at 13-14. The disruptive consequences of vacating the  
 3 prey increase program—namely significant harm to SRKW—outweighs the errors, even if they  
 4 are not minor. Further, Plaintiff has not come close to showing irreparable harm to wild salmon  
 5 as a result of the continued implementation of the program. In fact, NMFS has taken steps to  
 6 ensure that any adverse effects of hatchery salmon are considered in site-specific analyses.

7 For these reasons, the Court should affirm and approve the parts of the Report and  
 8 Recommendation that address the prey increase program, which will continue to provide a  
 9 much-needed supplement to the SRKW food supply.

## 10 ARGUMENT

### 11 I. Plaintiff's Challenges to the Findings Are Misplaced.

12 Plaintiff raises objections to three aspects of the Report and Recommendation's findings  
 13 on the prey increase program: the impact to salmonids; the site-specific reviews of hatchery  
 14 production; and the impact to SRKW. *Id.* at 8-11. Defendants' response will first describe the  
 15 ongoing site-specific reviews because those reviews help ensure that the potential impacts to  
 16 salmonids are evaluated and minimized.

#### 17 A. NMFS Is Conducting Site-Specific Reviews for Each Disbursement.

18 As an initial matter, it is important to place NMFS's site-specific review in context.  
 19 NMFS has established a set of criteria for choosing the hatcheries that receive funding through  
 20 the prey increase program. Those criteria include a requirement that none of the additional  
 21 production can jeopardize the survival and recovery of any ESA-listed species, including  
 22 salmon and steelhead, and a requirement that all hatchery production be reviewed under the  
 23 ESA and NEPA *before* funding can be utilized. Dkt. # 93-4 (Second Purcell Decl.) ¶ 8; Third  
 24 Purcell Decl. ¶ 4. Pursuant to these criteria, NMFS has analyzed each disbursement to ensure  
 25 compliance with the ESA and NEPA. *See* Third Purcell Decl. ¶ 5. This analysis takes different  
 26 forms depending on the type of ESA and NEPA analysis that has already been completed for  
 27 each hatchery. In some cases, the effects of an increase in production at the selected hatchery  
 28 has been fully evaluated in previously completed ESA and NEPA documents because either the

1 prior analysis considered a range of production and the increase falls within that range, or the  
 2 hatchery has reduced production following the original reviews and thus the increase falls  
 3 within the bounds of the previous analysis. *Id.* In other cases, NMFS has supplemented previous  
 4 analysis and/or reinitiated consultation. *Id.* To be clear, in all the scenarios, NMFS staff has  
 5 conducted a site-specific analysis to ensure that the increased production *at each facility* fully  
 6 complies with the ESA and NEPA.

7 Plaintiff's misstatements regarding the site-specific analyses severely undercut its  
 8 arguments for vacatur and injunctive relief. According to Plaintiff, NMFS has determined that  
 9 some disbursements do not require any ESA or NEPA review. Dkt. # 151 at 10. This appears to  
 10 be a reference to the chart in the Second Purcell Declaration, which included some boxes with  
 11 "N/A" in the ESA and NEPA columns. Second Purcell Decl. at 189-190 (Att. C). Plaintiff fails  
 12 to mention that those entries relate to money that was to be spent on either overhead or marking  
 13 trailers, which are pieces of equipment used to mark hatchery fish to distinguish them from wild  
 14 fish. *Id.* Both of these items have already been considered as part of the ESA and NEPA  
 15 analyses for the operation of the hatcheries themselves, thus removing the need for any  
 16 additional ESA or NEPA compliance. Plaintiff also mistakenly assigns significance to the  
 17 government's statement that NEPA may not be triggered. Dkt. # 151 at 10. While NMFS made  
 18 that argument for the funding program, that is distinct from whether NMFS has ensured NEPA  
 19 compliance for the site-specific hatchery programs receiving funds.

20 Next, Plaintiff suggests that "a BiOp" on production at the Little White Salmon National  
 21 Fish Hatchery (NFH), Carson NFH, Spring Creek NFH, and Dworshak NFH "does not evaluate  
 22 increased production under the prey increase program." *Id.* First, Plaintiff has the facts wrong—  
 23 NMFS completed its BiOp on the first three NFHs in 2007 but completed the BiOp on the  
 24 Dworshak NFH in 2017. *See* Third Purcell Decl. at 26 (Att. 2) (referring to Att. 2a for the first  
 25 three and Att. 2b for Dworshak). In addition, before disbursing prey increase program funding  
 26 for each of these four NFHs, NMFS reviewed the existing BiOps to determine whether they  
 27 fully evaluated the potential effects of increased production on ESA-listed species. Thus, NMFS  
 28 was not simply relying on the 2007 and 2017 BiOps, but rather assessing anew whether the

1 increase in production would trigger reinitiation of ESA consultation per 50 C.F.R. § 402.16.  
 2 For example, in 2022, NMFS funded the release of 2 million smolts from the Spring Creek  
 3 NFH. Third Purcell Decl. at 22 (Att. 1). Combined with the existing 10.5 million currently  
 4 produced by the NFH, this was less than the 15.1 million that was evaluated in the 2007 BiOp.  
 5 *Id.* at 51 (Att. 2a).

6 In addition to mischaracterizing the salience and scope of the site-specific analyses,  
 7 Plaintiff erroneously suggests that NMFS “cannot cure a failure to consult at the programmatic  
 8 level” through site-specific analyses. Dkt. # 151 at 10. But this statement ignores the fact that  
 9 NMFS has considered the aggregate effects as part of its site-specific analyses. *See* Third  
 10 Purcell Decl. ¶ 7 (“[W]e consider the cumulative impacts of all other hatchery programs that  
 11 may be contributing to [proportion of hatchery-origin spawners (pHOS)] for a particular  
 12 population.”); *id.* at 992-99 (Att. 2e). Moreover, the site-specific analyses that have occurred  
 13 and will continue to occur will help ensure ESA and NEPA compliance while the new  
 14 programmatic analysis is completed.

15 In sum, the Report and Recommendation correctly relied upon NMFS’s site-specific  
 16 analyses to support its conclusion that the prey program should continue during the remand.

17 **B. Plaintiff Fails to Show that the Prey Increase Program Will Harm Salmonids.**

18 Plaintiff contends that the continuation of the prey increase program will increase  
 19 pHOS, which in turn will harm threatened Chinook salmon. Dkt. # 151 at 8-10. This assertion is  
 20 misguided and ignores NMFS’s consideration of this exact issue in the site-specific analyses  
 21 described above.

22 Plaintiff relies here on Dr. Luikart’s First and Third Declarations, but those assessments  
 23 fail to grapple with the nuances of the prey increase program. In his First Declaration, Dr.  
 24 Luikart’s calculation for pHOS in the Lower Columbia River tributaries incorrectly assumed  
 25 that all the adult fish returning to the Columbia River basin would return to a small number of  
 26 tributaries in one area. Second Purcell Decl. ¶ 18. “In fact, the prey increase program is  
 27 designed to augment a portfolio of stocks that are important to SRKW, so by design it is much  
 28 broader in geographical span.” *Id.* More fundamentally, Dr. Luikart’s analysis is oversimplified.



Though hatchery-origin fish can pose a risk, “[o]ptimal pHOS will depend upon multiple factors, such as the importance of the population to ESA recovery and the fitness differences between hatchery-origin and natural-origin fish.” Third Purcell Decl. ¶ 7. Thus, as NMFS has engaged in its site-specific ESA evaluations, it has considered: where the fish are being released; the origin of the broodstock being used by the hatchery program; how many wild fish are incorporated into the broodstock; whether surplus hatchery fish will be removed at weirs to control pHOS; and the role of the affected populations in the recovery of an evolutionarily significant unit. *Id.* ¶ 8; *see id.* ¶ 7 (“NMFS considers these [multiple] factors in its site-specific ESA evaluations.”). It appears that Dr. Luikart has not reviewed these analyses by NMFS, and thus his generalized statements about harm to salmon miss the mark.

NMFS has also been working with the hatchery operators to implement tools that allow it to increase prey for SRKW while simultaneously reducing genetic risks to ESA-listed salmon. Second Purcell Decl. ¶ 19. For example, during development of a BiOp on hatchery programs in the Green/Duwamish River Basins, NMFS “worked with the hatchery operators to implement some key changes in the fall Chinook hatchery program” that the agency expects will substantially increase proportionate natural influence.<sup>1</sup> *Id.* Those changes included the creation of an area focused on natural production, where only natural-origin fish are passed above the weir, and hatchery-origin fish are removed at collection facilities when abundance reaches a certain level. *Id.*

The Report and Recommendation properly concluded that risks from hatchery-origin fish “can be mitigated to limit any potential negative impacts.” Dkt. # 144 at 35.

**C. Plaintiff Fails to Recognize that the Prey Program Provides a Meaningful Increase in Food.**

Contrary to Plaintiff’s assertions, the Report and Recommendation also properly concluded that a disruption to the prey increase program would harm SRKW. *See* Dkt. # 151 at 11-12. Plaintiff begins its attack on this part of the Report and Recommendation with what

---

<sup>1</sup> A population’s proportionate natural influence (PNI) is determined based on pHOS and the proportion of natural-origin fish incorporated into the broodstock (pNOB).

1 appears to be a self-defeating statement—Plaintiff contends that the declarations of Allyson  
 2 Purcell and Lynne Barre “do not provide analyses on how the proposed hatchery *increases*  
 3 actually *increase* prey availability for SRKWs.” *Id.* (emphasis added). In any event, the  
 4 declarations clearly show that an increase in fish from the hatcheries funded by the program will  
 5 result in more prey. Indeed, SRKW “do not distinguish between hatchery produced or wild  
 6 fish,” and, based on implementation records, the prey increase program is “on track” to provide  
 7 the “meaningful increase in prey.” Dkt. # 133-2 (Third Barre Decl.) ¶ 11; Third Purcell Decl. ¶  
 8 3.

9 Plaintiff changes course in the next paragraph when it asserts that the Purcell and Barre  
 10 declarations do not provide an analysis of the “net result on prey availability.” Dkt. # 151 at 11.  
 11 It is not clear what Plaintiff intends with the addition of the word “net,” but to the extent that it  
 12 refers to a comparison or balancing of the benefit to SRKW and the harm to Chinook salmon,  
 13 Plaintiff misses the mark because it continues to underestimate the benefits to SRKW, which  
 14 are tangible, and to overestimate the harm to Chinook salmon, which is being mitigated.

## 15 **II. Plaintiff Errs in Its Attempt to Tip the Scales in Favor of Vacatur.**

16 The Report and Recommendation correctly determined that the disruptive consequences  
 17 of vacating those parts of the BiOp related to the prey increase program outweigh the  
 18 seriousness of the errors. Dkt. # 144 at 37. In particular, the Report and Recommendation  
 19 reasoned that remand without vacatur is warranted “given the serious and certain risk to prey  
 20 abundance and availability that would result to the SRKW.” *Id.* Plaintiff’s attempt to dispute  
 21 that conclusion is based on the erroneous arguments discussed above, and therefore should be  
 22 rejected. *See* Dkt. # 151 at 13-14 (citing Sections III.A.1. – III.A.3). Plaintiff’s argument also  
 23 rests on the flawed assertion that the errors by NMFS are “exceedingly serious.” *Id.* at 13. The  
 24 implementation of the prey increase program as anticipated obviates an “error” that was  
 25 identified in the 2019 BiOp (*i.e.*, lack of certainty). *See* Dkt. # 149 at 2-3.

26 Plaintiff also paints a distorted picture of the application of NEPA to the prey increase  
 27 program. Dkt. # 151 at 14. Plaintiff contends that allowing the program to continue during  
 28 remand would “vitiate” NEPA because “NEPA requires review . . . before a decision is made to

1 implement the project.” *Id.* But the record shows that the site-specific analyses include  
 2 determinations under NEPA for each facility, and thus implementation at the hatchery level is  
 3 consistent with NEPA. Further, Plaintiff’s endeavor to analogize this case to others involving  
 4 NEPA is misplaced because every decision regarding vacatur depends on the particular errors  
 5 and disruptive consequences. For example, in *Metcalf v. Daley*, 214 F.3d 1135, 1146 (9th Cir.  
 6 2000), the court’s decision to vacate was based in part on the fact that “[u]nlike many of the  
 7 disputes we are called on to resolve, time here is not of the essence.” Here, by contrast, time is  
 8 of the essence because there is no dispute that prey availability is a priority for SRKW. Also,  
 9 numerous courts have chosen to remand without vacatur agency actions under the ESA where  
 10 vacatur would harm species. *See Nat’l Wildlife Fed. v. NMFS*, 839 F. Supp. 2d 1117, 1129 (D.  
 11 Or. 2011) (holding that “equity can authorize the district court to keep an invalid [action] in  
 12 place during any remand if it provides protection for listed species within the meaning of the  
 13 ESA.”); *Inst. for Fisheries Res. v. U.S. Food & Drug Admin.*, 499 F. Supp. 3d 657, 670 (N.D.  
 14 Cal. 2020) (“revoking the approval would presumably require the current stock of salmon to be  
 15 destroyed, a significant loss of property and animal life that would be wasteful given the real  
 16 possibility that the [agency] will be able to cure the NEPA and ESA errors on remand”); *Nat.*  
 17 *Res. Def. Council, Inc. v. U.S. Dep’t of Interior*, 275 F. Supp. 2d 1136, 1146 (C.D. Cal. 2002)  
 18 (“The strong public policy in favor of environmental protection indicates that the Court should  
 19 resolve uncertainties in estimating the risk of harm from habitat conversion during remand, in  
 20 the absence of viable critical habitat designations, in favor of retaining the disputed rules.”).

21 As the Report and Recommendation aptly noted, a “disruption to the prey increase  
 22 program, or its funding, thus appears primed to result in gaps in prey abundance that would lead  
 23 to increased risk to the health of the SRKW and threaten any future operation of the program.”  
 24 Dkt. # 144 at 31-32. Thus, the Court should decline Plaintiff’s invitation to vacate those parts of  
 25 the BiOp that pertain to the timely and essential prey increase program.

### 26 **III. Plaintiff’s Recycled Assertions About Injunction Fail.**

27 Plaintiff’s final contention is a renewed request for the “extraordinary remedy” of  
 28 permanent injunctive relief shutting down the prey increase program. *Monsanto v. Geerston*

1 *Seed Farms*, 561 U.S. 139, 165 (2010); *see* Dkt. # 151 at 15-17. This argument sinks when the  
 2 well-established standard for an injunction is applied.

3 To obtain a permanent injunction, a plaintiff must demonstrate: “(1) that it has suffered  
 4 an irreparable injury; (2) that remedies available at law, such as monetary damages, are  
 5 inadequate to compensate for that injury; (3) that, considering the balance of hardships between  
 6 the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest  
 7 would not be disserved by a permanent injunction.” *Monsanto*, 561 U.S. at 156-57. Plaintiff’s  
 8 primary argument for irreparable injury is that the prey increase program “will likely further  
 9 increase PHOS levels and thereby further inhibit the prospects for the continued survival, much  
 10 less recovery.” Dkt. # 151 at 16. But a *likelihood* of harm is the standard for a preliminary  
 11 injunction, not a permanent injunction. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22  
 12 (2008) (“Our frequently reiterated standard requires plaintiffs seeking preliminary relief to  
 13 demonstrate that irreparable injury is *likely* in the absence of an injunction.”). The fact is that  
 14 Plaintiff has not shown irreparable harm. Plaintiff’s generalized assertions of harm to wild fish  
 15 are wholly inadequate. Also, Plaintiff’s conclusory statements about a failure to conduct NEPA  
 16 and public policy are insufficient to show how Plaintiff has been injured and why it is  
 17 irreparable. Lastly, Plaintiff continues to overlook the site-specific analyses that have occurred.  
 18 *See supra*.

## 19 CONCLUSION

20 For these reasons, Defendants respectfully submit that the Court should affirm and  
 21 approve the parts of the Report and Recommendation that address the prey increase program.

22  
 23 Dated: January 24, 2023

Respectfully submitted,

24  
 25 TODD KIM  
 26 Assistant Attorney General  
 S. JAY GOVINDAN  
 Section Chief

27 OF COUNSEL:

28 SHEILA LYNCH  
 Office of General Counsel

/s/ Frederick H. Turner  
 FREDERICK H. TURNER  
 Senior Trial Attorney

*Defendants’ Response to Plaintiff’s Objections to  
 Report and Recommendation*

U.S. Department of Justice  
 P.O. Box 7611  
 Washington, D.C. 20044  
 (202) 305-0641

1 National Oceanic and Atmospheric  
2 Administration  
3 Seattle, WA

4 MOLLY E. WATSON  
5 Office of General Counsel  
6 National Oceanic and Atmospheric  
7 Administration  
8 Juneau, AK

U.S. Department of Justice  
Environment and Natural Resources Division  
Wildlife and Marine Resources Section  
Ben Franklin Station, P.O. Box 7611  
Washington, D.C. 20044-7611  
Phone: (202) 305-0641  
Fax: (202) 305-0275  
Email: frederick.turner@usdoj.gov

COBY HOWELL  
Senior Trial Attorney  
U.S. Department of Justice  
c/o U.S. Attorney's Office  
1000 SW Third Avenue  
Portland, Oregon 97204-2902  
Tel: (503) 727-1023 | Fax: (503) 727-1117  
Email: coby.howell@usdoj.gov

*Attorneys for Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on January 24, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Western District of Washington by using the CM/ECF system, which will serve a copy of the same on the counsel of record.

/s/ Frederick H. Turner  
FREDERICK H. TURNER  
Senior Trial Attorney  
U.S. Department of Justice  
Environment and Natural Resources Division  
Wildlife and Marine Resources Section  
Ben Franklin Station, P.O. Box 7611  
Washington, D.C. 20044-7611  
Phone: (202) 305-0641  
Fax: (202) 305-0275  
Email: frederick.turner@usdoj.gov

*Attorney for Defendants*